Decision 04-12-059

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

ORDER MODIFYING DECISION (D.) 04-11-014 FOR PURPOSES OF CLARIFICATION AND DENYING REHEARING OF THE DECISION, AS MODIFIED

I. INTRODUCTION

In Decision (D.) 04-11-014, we resolved the limited rehearing granted in D.03-08-076 and related matters involving the cost responsibility surcharges ("CRS") of municipal departing load ("MDL") customers. In this decision, we determined that for PG&E, "an explicit adjustment was made in its load forecast provided to DWR to recognize future bypass due to anticipated transfers of existing IOU load to irrigation districts and municipalities." (D.04-11-014, p. 4.) Accordingly, we concluded that a corresponding CRS exclusion was warranted to recognize the effects of this MDL "transferred load" component. (D.04-11-014, p. 4.) We further determined that "any new load served by publicly-owned utilities within the annexed areas covered by the PG&E transferred load should likewise be excluded from paying the CRS." (D.04-11-014, pp. 4-5.) In addition, we affirmed the exception granted for "new load" of publicly-owned utilities that was adopted in D.03-07-028, but subject to the limited rehearing granted in D.03-08-076. (D.04-11-014, p. 5.) We further determined that eligibility for the new MDL load exception is limited to publicly-owned utilities that were formed and serving at least 100 customers as of July 10, 2003. We also adopted

an interim cap of 150 MW on the "new load" exceptions for the combined service territories of PG&E and Edison before the end of 2012. The interim cap applies to the new MDL exception for "entities that are only serving 'new load' but no transferred load." (D.04-11-014, p. 5.)

The following parties timely filed applications for rehearing of D.04-11-014: Pacific Gas and Electric Company ("PG&E"), City of Industry & City of Rancho Cucamonga (jointly, "Cities"), Modesto Irrigation District ("Modesto ID"), and Merced Irrigation District ("Merced ID"). In its rehearing application, PG&E alleges that the adopted transferred load exceptions in PG&E's service territory for MDL customers is inconsistent with Commission precedents, and is not supported by the record. PG&E also asserts that the CRS exceptions for new MDL load in the service territory of PG&E and Southern California Edison Company ("Edison") violates the Public Utilities Code, is inconsistent with previous Commission decisions, and is unsupported by the record, including the 150 MW cap. PG&E also asks for clarifications regarding the cost responsibility for the DWR Bond Charge and tail CTC of those who have been excepted in D.04-11-014. Cities allege that the Commission erred in imposing the 100-customer requirement, which they claim is unnecessary and arbitrary, unsupported by the record, and unduly discriminatory against commercial and industrial customers. In their applications for rehearing, Modesto ID and Merced ID seek a clarification of the limited exception from certain cost responsibility surcharges for new load which locates in the geographic areas covered by the transferred load forecast in PG&E's Bypass Report.[1]

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[1] Cities, Modesto ID and Merced ID appear to inferentially raise a jurisdictional issue regarding the Commission's authority to impose CRS on new MDL customers. (See Cities' Application for Rehearing, p. 9, fn. 10; Modesto ID's Application for Rehearing, p. 3, fn. 2; Merced ID's Application for Rehearing, p. 2, fn. 3.) It is unclear whether these Applicants are alleging legal error, since they have failed to state grounds for legal error with the specificity required in Public Utilities Code Section 1732 and Rule 86.1 of the Commission's Rules of Practice and Procedure (Code of Regs, tit. 20, §86.1.)

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The following nine parties filed responses to the applications for rehearing: California Municipal Utilities Association ("CMUA"), Modesto ID, Cities, Merced ID, South San Joaquin Irrigation District ("SSJID"), North California Power Agency ("NCPA"), and Turlock Irrigation District ("TID"), Edison, and PG&E. CMUA, Modesto ID, Cities, Merced ID, SSJID, NCPA, and TID oppose PG&E's application for rehearing. Edison supports PG&E's application for rehearing, and opposes the Cities' application for rehearing. PG&E opposes the applications for rehearing filed by Modesto ID, Merced ID and the Cities.

We have carefully considered each and every allegation raised in the applications for rehearing of D.04-11-014, and are of the opinion that the decision should be modified to reduce the 150 MW interim cap to 80 MW and to clarify that transferred and new MDL remain responsible for tail CTC and the DWR Bond Charge to the extent these charges are applicable. Additionally, we clarify the decision with respect to the CRS exception for new load located in the geographic areas covered by the transferred load forecast in PG&E's Bypass Report. Rehearing of D.04-11-014, as modified, is denied.

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Moreover, we note that the irrigation districts would be barred from raising such a challenge under the doctrine of res judicata. The California Supreme Court summarily denied the petitions for writs of review challenging the lawfulness of D.03-07-028 and D.03-08-076, which included challenges to the Commission's authority to impose CRS on new MDL. (Modesto Irrigation District v. Public Utilities Commission, et al., Case Nos. S119310, S119365, S119368, S119376.) It has been established that summary denial of a petition for writ of review by the California Supreme Court is considered a resolution on the merits. (See e.g., Communications Telesystems Internat. v. California P.U.C. (9th Cir. 1999) 196 F.3d 1011, 1019; Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 901.)

II. DISCUSSION

A. The Commission acted consistently with its previous decisions in adopting the transferred MDL load exception in PG&E's service territory.

In its rehearing application, PG&E alleges that the exceptions for transferred MDL adopted in D.04-11-014 are inconsistent with previous Commission determinations regarding the liability for CRS. PG&E cites: Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("MDL CRS Decision") [D.02-11-022] (2002) ___ Cal.P.U.C.2d ___, Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("Navy Load Decision") [D.03-05-036] (2003) ___ Cal.P.U.C.2d ___; Order Resolving Motion of Central Valley Project Group ("CVP CRS Decision") [D.03-09-052] (2003) ___ Cal.P.U.C.2d ___, and Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("CGDL CRS Decision") [D.03-04-040]. (PG&E's Application for Rehearing, pp. 5 & 7-9.) It only specifically discusses the Navy Load Decision [D.03-05-036] and the CGDL CRS Decision [D.03-04-030]. (PG&E's Application for Rehearing, pp. 6-9.)[2] This allegation has no merit.

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[2] PG&E does not elaborate as to how D.04-11-014 is inconsistent with the DA CRS Decision and the CVP CRS Decision, except to say that "the Commission has deviate[d] from the decisions holding all post-[February 1, 2001] electric consumers [(with one exception)] responsible for the CRS." (PG&E's Application for Rehearing, p. 5.) The lack of specificity fails to meet the requirements of Public Utilities Code Section 1732 and Rule 86.1 of the Commission Rules of Practice and Procedure. Accordingly, the Commission is not required to address an issue raised in this manner. Even if the Commission were to address the issue, PG&E's argument has no merit. In D.04-11-014, the Commission acted within its statutory authority in granting an exception for transferred MDL, under its authority for determining the "fair share" permitted in Public Utilities Code Section 366.2(d). (See discussion, infra.).

1. Navy Load Decision [D.03-05-036]

In D.04-11-014, pp. 37-39, we rejected PG&E's analogy to the Navy Load Decision, where an exception was not given for 80 MW of Navy load in the territory of San Diego Gas and Electric Company ("SDG&E"). We explained how the circumstances in the Navy Load Decision differ from PG&E's transferred MDL situation:

> "We disagree that the U.S. Navy load treatment is analogous to the situation involved with the MDL transferred load. There are a number of differences between the two situations. For example, as explained in D.03-05-036, DWR/Navigant *included* the 80 MW in its modeling of SDG&E net short requirements, despite the fact that SDG&E had informed DWR/Navigant that this load should not be included because the Navy was procuring the load through its own separate contract. By contrast, DWR/Navigant expressly did *not* include any of the MDL transferred load in its forecasts or modeling thereof. Likewise, neither did it procure power on behalf of such PG&E load. Thus, DWR treated the load differently between the two situations with respect to whether it was included or excluded in forecasts and modeling calculations."

(D.04-11-014, p. 39.) We also relied on the principle of "cause-and effect" established in the MDL CRS Decision [D.03-07-028], "especially in the context of cost shifting.[3] (D.04-11-014, p. 40.)

[3] In its rehearing application, PG&E singles out the Commission's quotation from D.03-07-028 to explain why the Commission erred in its conclusion that the reasoning reflected in the Navy Load Decision is irrelevant to the transferred load. PG&E argues that quotation supports a conclusion concerning "new load" but not "transferred load." (PG&E's Application for Rehearing, pp. 6-7.) This argument misses the point of our discussion of D.03-07-028, because it mistakenly confines our reliance on D.03-07-028 to this single sentence. Rather, our discussion of D.03-07-028 focuses on the principle of cause-and-effect, "in the context of cost-shifting" that was established in that decision for MDL, regardless of any distinctions between new load or transferred load. (See D.04-11-014, pp. 39-40.)

There is no doubt that the circumstances in the Navy Load Decision differ from the transferred MDL identified in the PG&E August 2000 Bypass Report (see Exhibit 9 and Exhibit 14.). In the D.03-05-036, we concluded, based on the record, that DWR had included the 80 MW of Navy load because SDG&E had included the 80 MW in its modeling of SDG&E net short requirements, "despite the fact that "SDG&E had informed DWR/Navigant that this load should not be included." (Navy Load Decision [D.03-05-036], supra, at p. 6 (slip op.).) Consequently, DWR incurred costs associated with the 80 MW. In contrast, the record in the instant proceeding demonstrates that DWR had not incurred costs for the transferred load identified in the Bypass Report. (D.04-11-014, p. 37.) Accordingly, the transferred load is not analogous to the Navy load, and thus, we correctly rejected PG&E's analogy to the Navy Load Decision.

2. CGDL CRS Decision [D.03-04-040]

In its rehearing application, PG&E asserts that the exception for the transferred load is inconsistent with the CGDL CRS Decision. (PG&E's Application for Rehearing, pp. 7-8.) Specifically, it argues that the Commission erroneously relied on the CGDL CRS Decision to create the exception for transferred load, because the circumstances are different for the transferred MDL. (PG&E's Application for Rehearing, pp. 7-8.) PG&E argues that in the case of CGDL, "DWR itself reduced the IOUs' load forecasts to reflect the additional CGDL that DWR anticipated would occur," while this did not happen with the transferred load. (PG&E's Application for Rehearing, p. 7.)[4] We disagree.

[4] PG&E also argued that the exception for CGDL differs from the transferred MDL situation because of statutory and policy grounds. (PG&E's Application for Rehearing, pp. 8-9.) However, this particular difference is not controlling in the instant situation. Rather, as discussed above, the issue is whether DWR incurred costs for this transferred load, and not whether there were statutory or policy grounds to grant the exception.

In D.04-11-014, we rejected a similar argument as being without merit. (See D.04-11-014, pp. 35-37.) We observed that it was not relevant which entity made the adjustment. Rather, the essential question was "whether a particular component of load was included or excluded from the total forecast relied upon by DWR in procuring power." (D.04-11-014, p. 36.) As discussed below, the record supported the conclusion that "the load forecast provided to DWR by PG&E did, in fact, incorporate explicit assumptions concerning the bypass of MDL." Accordingly, we concluded that DWR did not incur costs for the transferred MDL, and thus, there was no cost-shifting. (D.04-11-014, p. 37.) On this basis, we concluded "in terms of the cause-and-effect relationship between load forecast assumptions and procurement decisions, DWR's procurement behavior with respect to MDL bypass assumptions was similar in effect as for Customer Generation bypass assumptions." (D.04-11-014, p. 37.)

PG&E has incorrectly concluded that the CGDL CRS Decision requires that any exception to the DWR component of the CRS must be based on DWR itself making the adjustment. What we required in the CGDL CRS Decision is that the load was excluded, and thus incurring no DWR costs or unlawful cost-shifting. (See CGDL CRS Decision [D.03-04-030], supra, at pp. 38 & 53 (slip op.).) This is the same principle of cause-and-effect that we applied in D.04-11-014, consistent with the CGDL CRS Decision.[5] Accordingly, PG&E is wrong that the Commission has acted inconsistently with this decision.

[5] We have long applied this principle, including in those decisions cited by PG&E in its rehearing application. (See DA CRS Decision [D.02-11-022], supra, at pp. 12-13, 27 & 56 (slip op.); CVP CRS Decision [D.03-09-052], supra, at pp. 11 & 15-16 (slip op.).) Thus, D.04-11-014 is consistent with those cited decisions.

B. The record supports the transferred load exceptions adopted for PG&E's service territory for MDL customers.

PG&E argues that the record does not support the transferred load exception. (PG&E's Application for Rehearing, pp. 9-12.) Specifically, it claims that the Commission erred in treating the bypass numbers in the August 2000 Bypass Report as incremental amounts rather than as cumulative amounts that included load that had already departed. Accordingly, PG&E asserts that the Commission should have reduced the total amount of bypass by the amount of load that had allegedly already departed. (PG&E's Application for Rehearing, p. 9.) PG&E's evidentiary challenge has no merit.

In D.04-11-014, we determined that DWR did not purchase for the transferred load identified in PG&E's August 2000 Bypass Report. This bypass information was reflected in the 2001-2003 sales forecast PG&E had provided to DWR. We found that instead of having received the bypass information in June 2001 as PG&E had previously claimed, the evidence showed that DWR had received this sales forecast on or about February 14, 2001 and that DWR relied on this sales forecast in making its purchases. Since the bypass information was reflected in the sales forecast, we concluded that DWR did not incur costs for such load, and thus, an exception for such load was justified. (See generally, D.04-11-014, pp. 16-40.)

Evidence from the record that supports our determinations on the transferred load identified in the PG&E's August 2000 Bypass Report include:[6]

- Testimony by PG&E Witness Keane regarding the sales information provided to DWR and that this information was provided in February 2001. (R.T. Vol. 21, pp. 2544-2555 (Keane/PG&E).) DWR also acknowledged that "DWR received PG&E's forecast on or about February 14, 2001 from

[6] D.04-11-014 makes references to most of this evidence in its discussion of the transferred load issue. (See generally, D.04-11-014, pp. 16-40.)

Mr. Roy Kuga. . . . The spreadsheet only included sales for 2001, 2002, & 2003." (Exhibit 14, Exhibit B, p. 3 (McDonald/DWR).)

- Testimony by DWR Witness Craig McDonald regarding how DWR used the sales forecast provided by PG&E to make its power purchase decisions. (See, e.g., R.T. Vol. 22, pp. 2588, 2631, 2641-2642 & 2684 (McDonald/DWR); Exhibit 16, Exhibit 3, p. 3 (DWR's Data Response to CMUA-1) (McDonald/DWR).) While PG&E's forecast only included sales for 2001, 2002, and 2003, "[t]he forecast was extended through 2010 using data from PG&E's Form [714] filing obtained from the Federal Regulatory Commission website." (R.T. Vol. 22, pp. 2637-2638 (McDonald/DWR); see also R.T. Vol. 22, pp. 2655-2656 (McDonald/DWR).)

- DWR accepted the forecasts provided by the IOUs, relying on the IOUs' analyses of their own loads. DWR did not create additional distinctions or assumptions regarding the utility forecasts. (R.T. Vol. 12, p. 1512; see also, DWR's Memo to ALJ's Ruling of October 23, 2003 re: Limited Rehearing ("Limited Rehearing Ruling"), dated December 16, 2003, p. 1.)

- Exhibit 73 demonstrates that although many contracts were executed before March 2001, there were a number of contracts executed thereafter. McDonald agreed "DWR negotiators negotiated and executed a material number of contracts between April 2001 and September 13, 2001." (R.T. Vol. 12, p. 1484 (McDonald/DWR); see also, CMUA's Reply to PG&E's Response to CMUA's Petition for Modification, dated March 29, 2004, p. 4., fn. 9.) This record confirms that DWR did rely on the sales forecast provided in mid-February 2001 in making its power purchases.

"While the specific figures in the Bypass Report relating to irrigation district and municipalization are not in dispute, parties expressed differing views concerning how the bypass figures should be translated into a CRS exclusion." (D.04-11-014, p. 22.) PG&E advocated that the CRS exception should be limited by the difference between the amounts in the Bypass Report and the actual bypass load that had already departed prior to February 1, 2001. (D.04-11-014, p. 24.) In D.04-11-014, pp. 25-26, we rejected PG&E's argument for a calculation of the CRS exception that would net figures in the Bypass Report with amounts of bypass occurring prior to February 1, 2001 because:

> "There is no record evidence indicating that DWR manipulated the amounts forecast by PG&E for any category of load for any given year to adjust for the effects of backward-looking actual data concerning what occurred in the year 2000. In the interest of consistency, therefore, we find no reason to conclude that DWR treated forecasts of MDL bypass any differently than forecasts of MDL attributable to any other load category. Thus, even assuming PG&E's claims concerning the actual year 2000 load are numerically accurate, we do not conclude that the actual figures should be applied as a reduction to the otherwise available CRS exception. The exception should be determined based upon the forecast amounts relied upon by DWR, rather than upon actual load fluctuations that were not considered by DWR.
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> DWR extended PG&E's forecast to cover the 2004-2010 period by applying annual growth rates based on data in PG&E's FERC Form 714 filing which was independent of PG&E's Bypass Report. Thus, DWR did not incorporate the 'trend line' growth rate to MDL included in the Bypass Report. Thus, DWR's extension of PG&E's forecast for the 2004-2010 period merely retained the absolute MWh amount from 2003 without increasing it by the trended amount from PG&E's regression analysis. Thus, we conclude that the CRS exception should likewise carry forward the absolute MWh amount from the 2003 forecast through 2010 without applying any escalation factor."

(D.04-11-014, pp. 25-26.)

Based on our assessment of the record evidence, including the evidence cited above, we were not convinced by PG&E's regression analysis,[7] and thus,

[7] Rejection of PG&E's regression analysis was not improper. (See Halstead v. Paul (1954) 129 Cal.App.2d 339, 341 ["It is equally true that a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary. [Citations omitted.]") Furthermore, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial

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reasonably concluded that there was no evidence that PG&E, in fact, made such an adjustment to the sales forecast it provided to DWR in mid-February 2001. Also, the record demonstrates that DWR made no adjustments to the forecast with respect to the bypass information reflected therein. (Exhibit 16, p. 1 (McDonald/DWR).) We reasonably assessed and weighed the evidence to arrive at this factual determination to reject PG&E's netting argument. In doing so, we acted properly as the "trier-of-fact," weighing the evidence, assessing credibility, and making factual inferences from the record, as necessary. (See Pub. Util. Code, §§1757 & 1757.1 [factual determinations lie with the Commission]; see, e.g., Lorimore v. State Personnel Board, supra, 232 Cal.App.2d at p. 187, regarding factual inferences an administrative agency may draw; see also, Louis & Deierich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal.App.3d 1574, 1584, quoting from Halstead v. Paul, supra, 189 Cal.App.3d at p. 341.) Accordingly, PG&E's argument that the record does not support the transferred load exception is without merit and is rejected.

C. The Commission did not violate the Public Utilities Code in adopting the exceptions for transferred or new MDL.[8]

In its rehearing application, PG&E argues that by giving transferred load and new municipal departing load an exception the Commission has not complied with Public Utilities Code Sections 451 and 453. (PG&E's Application for Rehearing, p. 13.) PG&E further asserts that the Commission has violated Public Utilities Code

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evidence in light of the whole record and will not be reversed. (See, e.g., Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 187.)

8 Although PG&E had titled this issue: "The New Load Exemption Violates the Public Utilities Code" in its Rehearing Application, it still makes reference to the transferred load in the discussion. Therefore, we have discussed this issue in the context of both the transferred load and new MDL.

Section 366.2(d), as codified by AB 117 (Stats 2000, ch. 838), because the Commission has allegedly permitted unlawful cost shifting to bundled customers. (PG&E's Application for Rehearing, pp. 4 & 13.) PG&E also claims that the Commission has violated Public Utilities Code Sections 367(a) and 369. (PG&E's Application for Rehearing, p. 13.) These arguments have no merit for the reasons explained below.

1. Public Utilities Code Section 451

Public Utilities Code Section 451 requires that "[a]ll charges demanded or received by any public utility. . . . shall be just and reasonable. (Pub. Util. Code, §451.) PG&E does not expressly explain why the exceptions adopted in D.04-11-014 are not just and reasonable. Rather, by inference, it is claiming that if the exceptions adopted in D.04-11-014 for new municipal departing load do not comport with those Public Utilities Code sections it cites in its rehearing application, then the exceptions result in unjust and unreasonable charges for these customers. (Application for Rehearing, p. 13.) Because we did not violate any of these codes, as discussed below, PG&E's claim of a Section 451 violation cannot stand.

2. Public Utilities Code Section 453

Public Utilities Code Section 453 prohibits public utilities from discriminating or granting any preference or advantage to particular persons or maintaining any unreasonable difference as to charges between localities or classes of service. (See Pub. Util. Code, §453, subd. (a) & subd. (c); see also, Reuben H. Donnelly Corporation v. Pacific Bell [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242-2, citing International Cable T.V. Corporation v. All Metal Fabricators, Inc. [D.71559] (1966) 66 Cal.P.U.C. 366, 382-283.)

PG&E's discrimination arguments have no merit. In Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060 ("Order Denying Rehearing of

D.02-11-022") [D.02-12-027, p. 26 (slip op.)] (2002) ___ Cal.P.U.C.2d ___, we set forth what was necessary to demonstrate a violation of Public Utilities Code Section 453:

> "First, for the prohibition of undue discrimination to apply, the customers must be similarly situated. (See Griffin v. Superior Court (2002) 96 Cal.App.4th 757, 775 ["The equal protection clause requires the law to treat those similarly situated equally unless disparate treatment is justified," and "[t]he 'similarly situated' requirement means that an equal protection claim cannot succeed, and does not require further analysis, unless the claimant can show that the two groups are sufficiently similar."]) However, bundled service customers are different from DA customers. Second, even if they are arguably similarly-situated based on the fact that they are retail end use customers, discrimination between such customers is lawful if there is a rational basis for the different treatment in the Commission's economic regulation. (Id. at p. 776; see also, Toward Utility Rate Normalization v. Pub. Utilities Com. (1978) 22 Cal.3d 529, 543-544; In re Antazo (1970) 3 Cal.3d 100, 110-111.)"

In the instant case, bundled customers and new MDL customers are not alike, and thus, not similarly-situated, or in like circumstances. Bundled customers are existing utility customers, while new MDL customers are not. Even if they are arguably alike, there is a rational basis for treating these classes of customers differently, and permitting the exceptions. We determined, based on the record, that DWR may not have incurred costs for a portion of the new MDL. Thus, exceptions were reasonably warranted.

3. Public Utilities Code Section 366.2(d)

Pursuant to Public Utilities Code Section 366.2(d), the Commission is responsible for ensuring that there is no cost-shifting as between bundled customers

and other types of customers, including MDL, whether transferred load or new load. (Pub. Util. Code, §366.2, subd. (d); see also, MDL CRS Decision [D.03-07-028, supra, at pp. 19-23 (slip op.); Order Denying Rehearing of D.03-07-028 [D.03-08-076, pp. 4-8 & 11 (slip op.)] (2003) ___ Cal.P.U.C.2d ___.) This statute sets forth who is responsible for paying the CRS, in particular the DWR-related cost components. It also provides the Commission with the discretion to determine the "fair share" that each customer class is responsible for paying. The "fair share" can be zero if there is no cost-shifting. (Pub. Util. Code, §366.2, subd. (d); see also, Order Modifying Decision (D.) 03-04-030 for Purposes of Clarification, and Denying Rehearing of the Decision as Modified ("Order Denying Rehearing of D.03-04-030") [D.03-05-039, pp. 6-7 (slip op.) (2003) ___ Cal.P.U.C.2d ___.) The statute also permits the Commission to adopt exceptions from paying a portion or 100 percent of the "fair share." (Id. at p. 6 (slip op.).)

The determinations in D.04-11-014 comport with Public Utilities Code Section 366.2(d). We were guided by the principles of preventing cost-shifting in adopting the exceptions for the transferred load and the new MDL. (See D.04-11-014, pp. 10, 12-13 & 36-37.) Underlying the issue of avoiding cost-shifting is whether DWR incurred costs on behalf of these loads. (See generally, D.04-11-014, pp. 13, 36-37, 40 & 50.) We were also concerned that in determining the CRS liability we did not create an undue burden on those customers on whose behalf DWR did not incur costs. (D.04-11-014, p. 13.)

Because it was shown that DWR did not incur costs for the transferred MDL load identified in the PG&E Bypass Report and for a portion of the new MDL, there was no cost-shifting for these MDL loads. Accordingly, we could adopt exceptions from the "fair share" as permitted by Public Utilities Code Section 366.2(d).

4. Public Utilities Code Sections 367(a) & 369

PG&E alleges that the Commission has violated Public Utilities Code Sections 367(a)[9] and 369,[10] by excepting the transferred load identified in the Bypass report and new MDL from having to pay tail CTC. (PG&E's Application for Rehearing, p. 13.) This allegation is based on an ambiguity as to whether the exceptions applied only to the DWR cost components of the CRS, or to all components of CRS, which includes tail CTC. This ambiguity is due to the Commission's reference to the "exceptions" generically as "CRS exceptions."

In D.04-11-014, we intended to only provide exceptions for the DWR power charge components of the CRS. Responsibility for payment of the tail CTC is governed by Assembly Bill 1890 (Stats. 1996, ch. 854.), which codified Public Utilities Code Sections 367(a) and 369. Thus,

> "All municipal load customers subsequent to December 20, 1995, shall continue to pay tail CTC, as prescribed by statute. If a municipality extends existing service territories into currently undeveloped areas of the IOU service territories then, consistent with Public Utilities Code Section 369, [footnote omitted] customers taking service in these areas should be responsible for CTC."

(MDL CRS Decision [D.03-07-028], supra, at p. 14 (slip op.).) This is also in accord with our discussion about CTC liability of MDL. (Id. at pp. 39-46.) While we had not

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[9] Public Utilities Code Section 367(a) specifies what costs can be recovered as tail CTC. (See Pub. Util. Code, §367, subd. (a).) Public Utilities Code Section 374 provides for some limited exemptions. (See Pub. Util. Code, §374.)

[10] Public Utilities Code Section 369 states that the obligation to pay CTC is not avoided by either the formation of a local publicly owned electrical corporation after December 20, 1995 or by annexation of any portion of an electrical corporations service area by an existing local publicly owned electric utility. (Pub. Util. Code, §369.)

intended that responsibility for the tail CTC to be different from what is statutorily required, D.04-11-014 does not make this clear. Accordingly, we modify D.04-11-014 to clarify this ambiguity.[11] (See discussion, infra.).

D. In adopting the exceptions for new MDL, the Commission acted consistently with its previous decisions.

In its rehearing application, PG&E claims that the exceptions for new MDL are inconsistent with previous decisions. PG&E cites the same decisions that it uses in its argument for challenging the exception for transferred load. Instead of elaborating, PG&E relies on its earlier discussion of its allegations that the Commission deviated from precedent in adopting the exception for transferred MDL. (PG&E's Application for Rehearing, pp. 13-14.) For the same reasons as discussed above, we have not acted inconsistently with the decisions cited in PG&E's rehearing application, and thus, this claim has no merit.

The exception for new MDL is based on the record, which establishes that DWR would not have purchased for all new MDL. (See discussion of the record supporting the exceptions for the new MDL related to the transferred MDL, infra, and related to new MDL of publicly-owned utilities who have only new load and no transferred load, supra.) Thus, as to that portion of load that DWR did not purchase for, no costs were incurred. Therefore, there would be no cost-shifting. Accordingly, exceptions from having to pay a portion or 100 percent of the "fair share" are lawfully permitted. (See discussion, above, regarding the Commission's authority under Public Utilities Code Section 366.2(d).)

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[11] PG&E makes a similar request for clarification in their application for rehearing, which will be granted. (PG&E's Application for Rehearing, p. 21.)

E. Except for the 150 MW interim cap, the record supports the new MDL load exceptions.

In its rehearing application, PG&E argues that the record does not support the new load exceptions. Specifically, it argues that the Commission misconstrued the record, and that D.04-11-014 errs in concluding that new MDL was implicitly included in the forecast PG&E provide to DWR in February 2001. PG&E accuses the Commission of relying on speculation and explains why the record supports its position. (PG&E's Application for Rehearing, pp. 14-17.) PG&E's argument has no merit.

In making our determination to grant new MDL exceptions,[12] we carefully reviewed and weighed the evidence in the record, including the assertion that no new MDL was included in the utilities' forecasts. (See generally, D.04-11-014, pp. 9-13.) We stated:

> "But when examining the issue of "new" MDL we simply are not convinced by the parties and the record that the "new" MDL was explicitly included in the forecasts of the IOUs or of DWR. Nor has any party shown with any persuasive certainty that "new" MDL was explicitly excluded. The basic reality is that the IOU forecasts transmitted to DWR and subsequently augmented by DWR were not performed to the level of specificity for "new" MDL that they were for other types of load. We know that "new" MDL was not

[12] In D.04-11-014, the Commission made two exceptions for new MDL. It permitted an exception for MDL associated with the transferred load identified in PG&E's August 2000 Bypass Report, and another exception for new MDL of publicly-owned utilities that did not have transferred load. The latter new MDL exception was limited by an interim cap. These two exceptions were made in response to a proposal advocated by Merced ID in its Opening Comments to Limited Rehearing Ruling, dated December 2, 2003, p. 6.) However, D.04-11-014 may not be all that clear regarding the new MDL exceptions. This is a point raised in SSJID's Response to the Applications for Rehearing, p. 3, which we find convincing. Thus, D.04-11-014 will be modified accordingly.

explicitly accounted for, but we cannot know for sure that it was not implicitly accounted for.

In fact, comments by both Edison and PG&E support the conclusion that "new" MDL was implicitly included in the forecasts. In Edison's opening comments, they state that "SCE's econometric load forecast model factors historical SCE trends of retail sales, and would to that extent necessarily include the *de minimus* annexation of its service territory noted above, but not as a separate 'line item' input." In addition, PG&E's comments responded that "explicit" adjustments are only necessary if there are "additional blocks of load that…are above the trend captured implicitly." D.03-07-028 already concluded that "a certain level of new MDL was assumed due to historical trends."

Thus, both utilities' comments and D.03-07-028 acknowledge that "new" MDL would have been implicitly accounted for in the forecasts, even though those adjustments were not large enough or noteworthy to warrant a specific line item adjustment to the forecasts. In addition, logically some "new" load of publicly-owned utilities is being created all the time, and thus, it does not make sense by inference that a portion of this load would not have been considered. It is a fact that publicly-owned utilities can and do serve new MDL, and this is also an historical fact. Obviously and undeniably, utilities have been aware that new load of publicly-owned utilities can have has affected their load forecasts, and as D.03-07-028 concludes, "it is reasonable to assume that historical trends will continue with current publicly-owned utilities."

For this reason, we grant the motion of CMUA to 'Update Exhibit 80' and amend its petition for modification. CMUA's motion includes information the SCE had updated its Exhibit 80 to include evidence of accounting for historical trends of annexations of its territory by publicly-owned utilities in the past. While this information is not directly relevant to the time period of costs at issue in this proceeding and should not be used to determine an exact amount of "new" MDL implicit in [Edison's] forecast, it does show by

> reasonable factual inference that there is a historical trend of some MDL that [Edison] was necessarily aware of and would have implicitly accounted for in its forecast delivered to DWR. Thus, we grant CMUA's motion of September 27, 2004.
>
> Finally, in deciding whether or not new load of publicly-owned utilities should be granted exceptions to the cost responsibility surcharge, we use the forecast as a prediction of what trends may occur, but not, by definition, what will actually happen with certainty. PG&E argues that there was no 'careful correlation' between the multi-year forecasts DWR received and the long-term commitments that DWR ultimately made. PG&E claims therefore that it is not reasonable to use those forecasts to excuse a portion of MDL customers from paying the CRS. We do not agree. Rather, we believe that the forecasts do not provide convincing and persuasive evidence to rebut the logical presumption of the historical trends for new municipal departing load and the inference that the utilities were aware of this trend and implicitly included this information in their load forecasts."

(D.04-11-014, pp. 10-12.)

Accordingly, the new MDL load exceptions are based on the record, and reasonable factual inferences drawn from the record. (See discussion above regarding the Commission's authority to draw such inferences; see also, Lorimore v. State Personnel Board, supra, 232 Cal.App.2d at p. 187; Louis & Deierich, Inc. v. Cambridge European Imports, Inc. , supra, 189 Cal.App.3d at p. 1584, quoting from Halstead v. Paul , supra, 129 Cal.App.2d at p. 341.)

Evidence in the record supporting the new MDL exceptions includes:

- Testimony from PG&E Witness Keane regarding new MDL for Modesto ID. (See R.T. Vol. 21, p. 2563 (Keane/PG&E); R.T. Vol. 13, p. 1751 (Keane/PG&E).) For the Modesto area, PG&E acknowledged that it considered the issue of municipal departing load and understood its influence in developing these forecasts. (D.03-07-028, p. 63, citing R.T. Vol. 13, p. 1770.)

- E-mail correspondence between PG&E employee, Andrew Bell and Ron Oeschsler of Navigant indicating that the information provided to DWR represented totals for all energy delivered at the customer's meter. (See, e.g., Exhibit 3, Attachment 2 (E-mails between Andrew Bell, PG&E, and, dated March 30, 2001); Exhibit 10: E-mails between Ron Oeschsler, Navigant, and Andrew Bell, PG&E, dated April 3, 2001, p. 04076 (Bate Stamped).)

- Testimony from DWR Witness McDonald that "[i]n terms of the long-term sales forecast, PG&E provided figures for total load, which included WAPA obligations and retail sales which is the sales that PG&E meters and/or bills. DWR did not ask specific questions about what customers were billed, rather DWR took "it at face value." (R.T. Vol. 22, p. 2650 (McDonald/DWR); see also. R.T. Vol. 22, p. 2669 (McDonald/DWR).) McDonald acknowledges that he did not know about which retail customers might have been excluded, including the City of Roseville's sales of kilowatt-hours to customers served within annexed areas of Roseville. (R.T. Vol. 22, p. 2651 (McDonald/DWR).)

- McDonald acknowledges that DWR would not have to "order power for folks who weren't in" the forecast (R.T. Vol. 22, p. 2669 (McDonald/DWR)), but noted that municipal departing load might implicitly be incorporated in the sales forecast on which DWR relied in making its purchases, if the following happened: "If municipal departing load was excluded from the 2001 through 2003 PG&E sales forecast, and if DWR used the 2001 through 2003 PG&E sales forecast to extend the forecast through 2009, and if the municipal departing load was implicitly excluded from the sales forecast from 2004 through 2009. (R.T. Vol. 22, p. 2654-2655 (McDonald/DWR).)

- McDonald noted: "[I]f new municipal load was excluded from PG&E's actual sales data on which future forecasts were based, . . . then this same level of new municipal load was implicitly excluded from the PG&E sales forecasts." (R.T. Vol. 22, p. 2658 (McDonald/DWR).)

- "DWR is informed and believes that the IOUs' forecasts were developed reflecting historical trends in electricity usage per customer and forecasts of population and employment growth for utilities' service areas. . . ." (Exhibit 16, Exhibit A: Memo to Paul Clanon from DWR, dated September 26, 2003, p. 2.)

- PG&E acknowledged that with respect to new load or transferred load within PG&E's service territory, "[t]here are a relatively small number of residential or small commercial customers served in new developments by public agencies." (Exhibit 103, p. 2.) Additionally, it acknowledged that "as of February 1, 2001, Merced ID was serving just 333 customers, 328 of which were former PG&E customers and 5 were 'new' customers." (PG&E's Comments to ALJ July 23, 2003 Ruling, pp. 4-5.)

- PG&E states that its August 2000 bypass forecast relied upon a time-trend linear regression using historical data on existing PG&E customers who had departed to date to Modesto and Merced Irrigation Districts, knowledge of then-pending plans by South San Joaquin and Laguna Irrigation Districts to condemn PG&E's facilities and serve existing PG&E customers, information from PG&E's account services representatives about anticipated future condemnations by existing municipal utilities (Redding, Roseville, and Lodi), and an expected value calculation of lost sales of existing PG&E customers associated with possible condemnation efforts by two potential municipalities (Davis and Brentwood). See PG&E's September 1, 2004 testimony for details." (Exhibit 14 (PG&E's Data Response, Answer 3), p. 1; see also, Exhibit 14, PG&E's Data Response, Answer 5, Attachments.)

- Comments by various parties, including CMUA, Merced ID, SSJID and NCPA regarding the IOUs' knowledge of load to be served by publicly-owned utilities. (See, e.g., CMUA's Opening and Reply Comments to ALJ July 23, 2003 Ruling, dated August 15, 2003 and August 29, 2003, respectively; CMUA's Opening Comments to Limited Rehearing Ruling, p. 3-7; Merced ID's Comments to ALJ Ruling of October 20, 2003 re: Limited Rehearing, p. 3, citing to D.03-07-028, p. 60, fns. 8 & 9; SSJID's Opening Comments to ALJ's Limited Rehearing Ruling, p. 5; NCPA's Opening Comments to ALJ's Ruling of October 23, 2003 re: Limited Rehearing, dated December 2, 2003, pp. 2-3; Modesto ID's Reply Comments to ALJ's Limited Rehearing Ruling, dated December 16, 2003, pp. 4-6; Industry's Reply Comments to Limited Rehearing Ruling, dated December 16, 2003, p. 5.)

- Merced ID advocated for a new load exception independent of the new load exception for existing POUs such as Merced ID. (Merced ID's Opening Comments to ALJ Limited Rehearing Ruling, dated December 6, 2003, p. 6; Merced ID's Reply Comments to Limited Rehearing Ruling, dated December 16, 2003, p. 4.)

- PG&E states that "PG&E's 2001-2003 sales forecast that DWR references in its data response to PG&E. . .reflect[s] a bypass report prepared by PG&E

Witness in August 2000." (CMUA's Reply Comments to Limited Rehearing Ruling, dated December 16, 2003, p. 1 [sic][13], citing PG&E's Opening Comments, at p. 2.)

- CMUA sets forth bypass activities, including new publicly-owned utilities that will serve new residential and commercial developments. (CMUA's Reply Comments to Limited Rehearing Ruling, dated December 16, 2003, pp. 2-3 [sic], citing to Attachment 3, p. 2-14 (Excerpts from 1999 General Rate Case Application (Chapter 2 – Proposal To Avoid Uneconomic Bypass of PG&E's Distribution System).)

- CMUA describes how Edison and SDG&E were aware that there future load that might be lost to newly-formed publicly-owned utilities. (CMUA's Reply Comments to Limited Rehearing Ruling, dated December 16, 2003, pp. 7-9[sic]; see also, Attachments 1-3, regarding PG&E, Attachment 4-5, regarding Edison, and Attachment 5, for SDG&E (Attachment 5).)

- Edison acknowledges the existence of new MDL, albeit its witness, "Kevin Payne, characterized that load loss" as "minimal" and "small." (Edison's Comments to CMUA's Petition for Modification, dated March 18, 2004, p. 3, citing to R.T. Vol. 13, p. 1672; see also, evidence cited in Order Denying Rehearing of D.03-07-028 [D.03-08-076], supra, at pp. 16-17.)

- "[Edison] is aware of approximately 17 instances in which annexations of unincorporated land have taken place on which were located at the time of the annexation customers served by [Edison]. Once a service cut-over takes place, [Edison] does not have available a mechanism to identify or track the amount of 'new municipal load' which locates into the annexed areas." (Edison Response to CMUA's Petition for Modification, dated March 18, 2004, Attachment of Edison's Response to CMUA's Data Request, Answer to Question 2.1 (William Hamme, Edison's Project Manager, Controllers, emphasis added).)
- "The load forecast provided to DWR was based upon a forecast of [Edison] retail sales made in March 2000. That forecast was made using econometric models to relate [Edison] retail sales to various economic, demographic, weather, and electricity price variables. . . . [Edison] has not done any study

[13] The pages in CMUA's Reply Comments to the Limited Rehearing Ruling are off by one page, because page 1 starts at page 2. Thus, citation to these comments is based on how CMUA has numbered the pages.

to see if Public Power Utility (PPU) annexations are directly or inversely related to any of the driver variables in the sales forecasting equations. These PPUs continue to represent approximately 7 percent of the total metered load in SCE's control area." (Edison Response to CMUA's Petition for Modification, dated March 18, 2004, Attachment of Edison's Response to CMUA's Data Request, Answer to Question 5.1.1, pp. 1-2 (Arthur Canning, Manager of Energy Supply & Management).)

- "[Edison] prepared and submitted its load forecasts to DWR, including one prepared in March 2000 and submitted in January 2001." (Edison Response to CMUA's Petition for Modification, dated March 18, 2004, Attachment of Edison's Response to CMUA's Data Request, Answer to Question 8 (Arthur Canning/Edison).) This information looks like a sales forecast, and thus, does not necessarily include new MDL.

In D.04-11-014, we weighed the credibility of the assertion that the utilities anticipated serving every single kilowatt of load that might ever locate in California with the evidence in the record, including the evidence cited above. Thus, we drew reasonable factual inferences from the evidence in the record to reach our findings on the new MDL exceptions, and such findings should not be disturbed. (See City and County of San Francisco v. Public Utilities Com. (1985) 39 Cal.3d 523, 530.) Accordingly, PG&E's assertions that the record does not support the new MDL exceptions are without merit.

F. The record supports the adoption of an interim cap, but not the amount of 150 MW.

In D.04-11-014, we adopted a cap of 150 MW on the CRS exceptions available for new MDL based on the proposal made by CMUA. (D.04-11-014, pp. 13-14.) This was an interim cap, subject to further consideration in the billing and collection phase, which would be spread across the PG&E and Edison territories before 2012. (D.04-11-014, pp. 13-14.) We adopted the cap as a limitation on the MDL CRS exception to address "the loophole in CRS collection that gives publicly-owned utilities an incentive to form and site facilities with the express purpose of

escaping CRS charges." (D.04-11-014, p. 13.) Further, we observed that that the 150 MW was a *de minimus* amount that represented less than one-third of one percent of the combined load of PGE, Edison and SDG&E. (D.04-11-014, p. 14.)

In its rehearing application, PG&E argues that there is no record to support the 150 MW. (PG&E's Application for Rehearing, pp. 4 & 19-20.) Upon review of the evidentiary record, we find that PG&E's argument has merit.

Although there is no evidentiary record to support the 150 MW cap, there is record evidence to support imposing an 80 MW cap. In its comments, SSJID proposed a cap that it calls a "set aside" – "a certain level of megawatts for which [publicly-owned utilities] that commence providing retail service after that date could apply in order to receive an [exception] for new load." (SSJID's Opening Comments to Limited Rehearing Issues, dated December 2, 2003, pp. 5-6; see also, SSJID's Reply Comments to Limiting Rehearing Issues, dated December 16, 2003, pp. 5-6.).) SSJID proposed this "set aside" as way to cap "the exposure from the potential loophole of newly formed [publicly-owned utilities] attempting to take advantage of the disparity in rates associated with DWR and historical utility costs as identified in Decision 03-07-028." (SSJID's Opening Comments to Limited Rehearing Issues, dated December 2, 2003, p. 6.) SSJID suggested 80 MW, as an example, for excepting new MDL from paying CRS under designated circumstances, which includes qualifying on a first-come, first served basis. (SSJID's Opening Comments to Rehearing Issues, dated December 2, 2003, p. 6.) All parties, including PG&E, have had an opportunity to comment on SSJID's 80 MW proposed cap. (See PG&E's Reply Comments to Limited Rehearing Issues, dated December 16, 2003, p. 11.) Thus, we modify the decision to replace the 150 MW cap with an 80 MW cap, because this latter figure is in the record and represents a *de minimus* amount. Further, as noted in D.04-11-014, the amount of the cap is interim in nature and shall be revisited in the billing and collections phase of this proceeding. (D.04-11-014, p. 14.) We expect that during this phase, the parties will present for our consideration a specific amount for the cap, whether 80 MW or another number, that is fully presented, explained and justified.

G. PG&E's requested clarifications concerning the cost responsibility for the DWR Bond Charge and tail CTC are granted.

In its rehearing application, PG&E requests that the Commission clarify that the exceptions provided to the transferred load and new MDL do not excuse such load from having to pay the DWR Bond Charge and tail CTC in the manner provided by law.

With respect to the DWR Bond Charge, Public Utilities Code Section 366.2(d) provides that "each retail end-use customer that has purchased power from an electric corporation on or after February 1, 2001, should bear a fair share of the [DWR's] electricity purchase costs, as well as electricity purchase contract obligations incurred. . . ." (Pub. Util. Code, §366.2, subd. (d)(1).) This statute also provides: "It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers." (Pub. Util. Code, §366.2, subd. (d)(1).)

Based on this statutory language, transferred load is subject to the Bond Charge, even though the excepted load need not pay the DWR Power Charge, since DWR did not incur procurement costs on behalf of this load. This is consistent with our determination for CGDL. (See CGDL CRS Decision [D.03-04-030], supra, at p. 50 (slip op.).) In that decision, in the absence of statutory and policy justifications, similar to those for clean customer generation system under 1 MW, we determined that the exception would not exclude the CGDL from having to pay the DWR Bond Charge, nor exclude the tail CTC.[14] (Id.)

With respect to excepted new MDL, there appears to be no statutory or policy justification warranting an exception from having to pay the DWR Bond Charge. Thus, consistent with CGDL CRS Decision, new MDL should be held

[14] This is consistent with the modifications to D.03-07-028, in particular for Conclusion of Law No. 13 and Ordering Paragraph No. 6), which had been proposed by CMUA in its petition. (See CMUA's Petition for Modification, Appendix A, pp. iii-iv.)

responsible for the DWR Bond Charge, pursuant to Public Utilities Code Section 366.2(d),[15] even though they will not have to pay the DWR Power Charge.

With respect to the tail CTC costs, we modify D.04-11-014 to clarify the ambiguity that the exceptions adopted in the decision do not incorporate an exclusion from having to pay the tail CTC, as required, and not otherwise exempted, by law. (See discussion, infra.)

H. The Commission acted within its authority when it determined that only those publicly-owned utilities serving 100 customers or more would be eligible for the CRS exclusion.

As directed in MDL CRS Decision [D.03-07-028], supra, at pp. 61-62, D.04-11-014 clarified the definition of "publicly-owned utility" for determining eligibility for a CRS exclusion. Thus, a "publicly-owned utility" is one which was "(1) providing electricity to retail end-use customers on or before July 10, 2003; and (2) serving 100 or more customers. (D.04-11-014, pp. 46 & 59 (Ordering Paragraph No. 13).) Cities contend that the Commission erred in including the 100-customer requirement on numerous grounds. None of them have merit.

Cities first contend that since the purpose of the 100-customer requirement is to "insure against disproportionate expansion," this requirement is now unnecessary because the Commission has limited the CRS exception for new load to 150 MW in the PG&E and Edison territories combined. (Cities' Application for Rehearing, pp. 6-7.) We disagree. In D.03-07-028, we stated "[i]t is our intent that only those publicly-owned utilities with ***substantial*** operations in place as of February 1, 2001 gain such benefit" and proposed the 100 customer requirement as an example of what it considered "substantial." (MDL CRS Decision [D.03-07-028], supra, at pp.

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[15] See Order Denying Rehearing of D.03-07-028 [D.03-08-076], supra, at pp. 4-8 (slip op.) for a discussion of the Commission's authority to impose the DWR Charges of the CRS on new MDL.

61-62 (slip op.), emphasis added.) Based on record evidence, we determined that a minimum 100-customer size criterion, along with a cutoff date, was a reasonable method to determine which publicly-owned utilities had substantial operations.

While the 100-customer requirement also serves as a means to avoid "disproportionate expansion" by the eligible publicly-owned utilities, it is not rendered unnecessary simply because we have also imposed a cap on this new MDL exception. Indeed, Cities' argument suggests that we may only use a single means to avoid "disproportionate expansion." However, they cite no legal authority to support such a proposition. Further, D.03-07-028 notes, with respect to the February 1, 2001 cutoff date for eligibility that:

> "it is unlikely but possible that existing publicly owned utilities will add large amounts of new MDL, beyond any reasonable forecasted levels. This could have the unintended effect of causing impermissible cost-shifting. If this occurs, we will not hesitate to reconsider this decision."

(Id. at p. 62 (slip op.).) Thus, we were aware that a single limitation to prevent disproportionate expansion might not be sufficient. Therefore, the cap would serve as an additional safeguard to prevent disproportionate expansion. For these reasons, there is no basis for concluding that the 100-customer requirement is unnecessary simply because a cap on new MDL exception has been established.

Cities next assert that the 100-customer requirement is not supported by the evidentiary record. (Cities' Application for Rehearing, p. 8.) This assertion is unfounded. In the ALJ ruling to clarify the definition of "publicly-owned utility," parties were specifically asked to comment on whether "there [should] be a specific size cut-off criterion (*e.g.*, number of customers, load, etc.) in order for an existing [publicly-owned utility] to qualify for CRS exceptions." (Administrative Law Judge's Ruling Soliciting Comments on the Criteria for New Load Exception for Existing Publicly Owned Utilities ("ALJ July 23, 2003 Ruling"), dated July 23, 2003, p. 2.) Additionally, the ruling requested publicly-owned utilities that had a relatively small

number of customers to comment as to whether their new MDL customers should be eligible for a CRS exception. (ALJ July 23, 2003 Ruling, dated July 23, 2003, p. 3.) The following parties submitted comments regarding the 100-customer requirement:

- PG&E said that the qualification should be consistent with the principles set forth in D.03-07-028, and that one of the requirements should be that the publicly-owned utility is "serving more than minimal numbers of customers (e.g., 100)." (PG&E's Opening Comments to the ALJ July 23, 2003 Ruling, p. 2, emphasis in original; see also, PG&E's Reply Comments to ALJ July 23, 2003 Ruling, p. 2.)

- SDG&E stated: "It is clear that [D.03-07-028] envisions that much greater operations would be required than service to a few customers using little or no infrastructure owned by the POU. Engaging in occasional, or 'cherry-picking', transactions by a POU does not constitute true, substantial utility operations to service the citizens of the POU. While the use of a rule-of-thumb number of customers, such as 100, is appropriate as a minimum condition for qualifying for status as having 'substantial operations', it should be only a screening tool and not a conclusive test that the POU qualifies for an exception from payment of CRS. Other factors should be considered . . . ." (SDG&E's Opening Comments to ALJ July 23, 2003 Ruling, p. 4.)

- Modesto ID expressed no objection to the 100 or more customers requirement; it only argued that no new criteria should be added that would narrow the eligibility of new MDL for the CRS exception. (Modesto ID's Opening Comments to ALJ July 23, 2003 Ruling, pp. 5-6.)

- Merced ID advocated that there be no changes that would "impinge on the baseline definition of existing publicly owned utilities adopted in D.03-07-028, and that any exceptions considered pursuant to the ALJ's Ruling will be in addition to that definition." (Merced ID's Opening Comments to ALJ July 23, 2003 Ruling, pp. 2-3.)

Based on these comments, we reasonably concluded that a publicly-owned utility with "substantial operations" was one which had at least 100 customers. As demonstrated above, the evidentiary record supports this conclusion.

Further, Cities' argument that they had "substantial operations" because they had "invested millions of dollars in infrastructure" (Cities' Application for

Rehearing, p. 8), simply demonstrates that this was another criterion that could have been used for defining "substantial operations." However, we explained that we had selected the 100 customer requirement over other methods for determining "substantial operations" proposed by parties, because the 100-customer requirement "is an objective test that does not require a mini-hearing for each publicly-owned utility claiming the exception." (D.04-11-014, p. 47.) The fact that Cities believe that "substantial operations" should be defined in a different manner than the one we selected is not grounds for granting rehearing.

Cities further dispute the decision's conclusion that the 100-customer requirement is the best and most efficient way to insure against disproportionate expansion. (Cities' Application for Rehearing, p. 8.) Instead, they assert that the cap would better insure against disproportionate expansion. As discussed above, we selected the 100-customer requirement because it is the most objective and easiest to administer. Additionally, the 100-customer requirement, combined with a cap on new MDL exception, achieves our objective of preventing disproportionate expansion by publicly-owned utilities with "substantial operations." Cities' assertion that the cap is the most efficient way to prevent expansion, on the other hand, ignores our stated intent to only grant the CRS exception to publicly-owned utilities with substantial operations. Accordingly, Cities' arguments are without merit.

Cities additionally maintain that the 100-customer requirement violates Public Utilities Code Section 453, subdivisions (a) and (c). (Cities' Application for Rehearing, pp. 9-10.) Cities assert that all new publicly-owned utilities are similarly situated with respect to the CRS, and thus the Commission should not make a distinction between "customers of [publicly-owned utilities] that have more than 100 customers and those than (sic) do not," since doing so would "specifically discriminate" against publicly-owned utilities with commercial/industrial customers. (Cities' Application for Rehearing, p. 10.) These arguments lack merit.

Public Utilities Code Section 453 states that public utilities cannot "make or grant any preference or advantage to any corporation or person or subject any

corporation or person to any prejudice or disadvantage" nor "establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." (Pub. Util. Code, § 453, subd. (a) & (c).) However, not all discrimination is unlawful under Section 453. "To be objectionable, discrimination must 'draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges.' " (Citation.)" (Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1180; see also International Cable T.V. Corp. v. All Metal Fabricators, Inc., supra, 66 Cal.P.U.C. at p. 382 [discrimination by a public utility "refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general."].)

Thus, when considering a discrimination complaint under Public Utilities Code Section 453, we must first determine whether the difference in treatment of two customers is justified by the circumstances. In this instance, we determined that the CRS exception should only apply to new load of publicly-owned utilities with substantial operations. The determination to limit the CRS exception to only those publicly-owned utilities with "substantial operations" was to "avoid creating a loophole that would encourage new publicly-owned utilities to develop solely to take advantage of a disparity in rates associated with DWR and historical utility cost responsibility costs – to the detriment of remaining IOU ratepayers." (D.04-11-014, p. 46.) Thus, the circumstances warranted treating publicly-owned utilities with "substantial operations" (i.e., those which were providing electricity to retail end-use customers on or before July 10, 2003 and were serving more than 100 customers) differently than publicly-owned utilities who did not have substantial operations.

Furthermore, the eligibility criteria are applied in the same manner to all publicly-owned utilities. A publicly-owned utility, regardless of its customer base, must meet both criteria in order to be eligible for the CRS exception. Thus, a publicly-owned utility which began providing electricity to 1,000 retail end-use customers on July 11, 2003 would not be eligible for the CRS exception. Similarly, a publicly-owned utility which was providing electricity to 99 retail end-use customers on July

10, 2003 would also not be eligible. These two criteria do not distinguish between residential and commercial/industrial customers. With respect to the 100-customer requirement, both a residential customer with numerous submeters (e.g., an apartment building) and a commercial customer with numerous submeters (e.g., an office complex) would be considered a single customer for purposes of determining eligibility. Finally Cities speculate that they would have met the 100-customer requirement if their "customer base consisted of residential rather than commercial/industrial customers." (Cities' Application for Rehearing, p. 9.) However, such speculation is not a basis for finding discrimination. Accordingly, limiting the CRS exception to only those publicly-owned utilities with a minimum of 100 customers is not unlawful discrimination in violation of Public Utilities Code Section 453.

Finally, Cities argue that the 100-customer requirement is "unjust" because it excludes publicly-owned utilities with a small number of large customers while including publicly-owned utilities with a large number of small customers. It further alleges that the requirement is "unreasonable" because avoiding "disproportionate expansion" is already accomplished by a July 10, 2003 cutoff date and a 150 MW cap. (Cities' Application for Rehearing, p. 11.) Accordingly, Cities assert that the decision violates Public Utilities Code Section 451. Cities' assertion is incorrect.

Public Utilities Code Section 451 requires that all charges demanded or received by a public utility for products provided or services rendered be just and reasonable. (Pub. Util. Code, §451.) In this instance, we determined that it was reasonable to permit only MDL customers of those publicly-owned utilities with "substantial operations" to be eligible to receive an exception from CRS, and established the criteria, which included the 100-customer requirement, for determining eligibility. Moreover, as discussed above, there is no error in adding further limitations (i.e., the cap) to prevent possible "disproportionate expansion." Finally, as already stated, the 100-customer requirement does not distinguish between customer

types when determining eligibility. Accordingly, Cities have failed to demonstrate that the 100-customer requirement is unreasonable and in violation of Public Utilities Code Section 451.

For these reasons, Cities have failed to state any grounds for finding that use of the 100-customer requirement to determine the eligibility of an MDL customer of a publicly-owned utility to receive the CRS exception is in error. Accordingly, Cities' Application for Rehearing is denied.

I. Modesto ID and Merced ID's request for a clarification of the limited exception from certain cost responsibility surcharges for new load is granted.

D.04-11-014 determined that the new MDL of existing publicly-owned utilities would qualify for the CRS exception to the extent that the "new load exception is confined to the geographic areas that were subject to the transferred load in the Bypass report." (D.04-11-014, pp. 21-22.) In their rehearing applications, both Modesto ID and Merced ID assert that the term "annexed service territory" in Finding of Fact 11 could be read as limiting the CRS exception for new load to only areas "annexed" into a publicly-owned utility's territory, and not include those areas that have historically been identified as areas within which a publicly-owned utility would provide retail electric distribution services. (Modesto ID's Application for Rehearing, pp. 4-5; Merced ID's Application for Rehearing, pp. 4-5.) Therefore, they request that for following Ordering Paragraph be added to the decision

> "New MDL within those geographic areas covered by the transferred load identified in PG&E's August 2000 Bypass Report, including geographic areas served by all publicly owned utilities identified in the Bypass Report as those areas existed as of February 1, 2001, is excepted from any obligation to pay CRS."

Upon review of the text of the decision and the evidentiary record, we agree with the irrigation districts. In D.03-07-028, we had determined that it would be reasonable "to assume that historical trends will continue with current publicly-owned utilities and to not impose a CRS on new MDL associated with existing publicly-

owned utilities (including publicly-owned utilities with non-exclusive service areas)." (D.03-07-028, p. 61 (slip op.).) Thus, we clearly contemplated that any exception for new MDL to include geographic areas where an IOU still had an obligation to serve. Additionally, we addressed the issue of a CRS exception for new MDL of Merced ID in the shared service territory and concluded that this new load would be eligible for the CRS exception. (D.04-11-014, pp. 49-51.) Moreover, the record indicates that PG&E knew that the irrigation districts did have both transferred and new MDL customers in the shared service territory. (See, e.g., Exhibit 103.) Since the CRS exception for transferred load includes load in the shared service territory, it logically follows that the CRS exception for new MDL would also apply in these geographic areas. However, our reference to "annexed service territory" in Finding of Fact 11 may lead to the erroneous conclusion that we were restricting the CRS exception for new MDL of publicly-owned utilities listed in the Bypass Report to only those geographic areas that had been annexed or condemned. This was not our intent. Accordingly, we will make the clarification in D.04-11-014 requested by Modesto ID and Merced ID.[16]

[16] In its response to the rehearing applications filed by Modesto ID and Merced ID, PG&E contends that there is no justification to extend the CRS exception to the shared service territories where the irrigation districts are they are competing with PG&E for new customers. (PG&E's Response, pp. 9-11.) We disagree. In D.04-11-014, we addressed similar arguments raised by PG&E and determined that new MDL of Merced ID did qualify for the CRS exception. (D.04-11-014, pp. 49-51.) Further, PG&E's arguments are simply a disagreement with our policy determination that the CRS exception for transferred load in shared service territories would apply equally to new load.

III. CONCLUSION

Therefore, based on the above discussion, we modify D.04-11-014 as ordered below. Rehearing of D.04-11-014, as modified is denied.

THEREFORE, IT IS ORDERED:

1. D.04-11-014 is modified as follows:

   a. On pages 13-14, the second paragraph under Section IV.B. Amount of "New Load" to be Granted CRS Exceptions is replaced by the following paragraphs:

   > "CMUA has proposed that the Commission grant exceptions to the CRS for new MDL up to a limit of 150 MW in the PG&E and Edison territories combined by the year 2012, for those entities that have only new load and no transferred load. SSJID also proposes a cap, but gives an 80 MW as a suggested amount for the cap. As we stated in D.03-07-028, while we wish to be fair to those publicly-owned utilities whose customers were never IOU customers and never took DWR power, we do not wish to create a loophole in CRS collection that gives publicly-owned utilities an incentive to form and site facilities with the express purpose of escaping CRS charges. Therefore, we believe there should be a cap on the amount of new MDL granted exceptions to CRS for those entities that are not specifically named in the Bypass Report.
>
> However, the amount proposed by CMUA of 150 MW for the cap is not found in the record, but the 80 MW suggested by SSJID is. Although SSJID provided the 80MW as an illustrative amount, we believe it is reasonable to use this amount as a cap on an interim basis because of its *de minimus* nature. Therefore we set an interim cap of 80 MW until 2012 of new load that is granted an exception to the CRS by this decision. This is a cap for the PG&E and SCE territories, since no evidence was

submitted that there has been any history of municipalization in the SDG&E territory. We also consider 80 MW interim cap spread across the PG&E and SCE territories before 2012 to be a *de minimus* amount that would not have been separately or explicitly accounted for in any load forecast of the IOUs. 80 MW represents less than one-sixth of one percent of the load of PG&E, SCE, and SDG&E combined."

b. The following language is added to the text of D.04-11-014 at the end of the introduction section on page 5.

"When we speak of the exceptions for transferred load and certain new MDL in today's decision, we mean that they are excluded from cost responsibility for the DWR Power Charge. Such loads remain responsible for any ongoing "competition transition charge" (CTC) as prescribed and defined by Public Utilities Code Sections 367 and 369 and for the DWR Bond Charge, as otherwise applicable. We believe this is consistent with our imposition of the DWR Bond Charge in D.03-04-030 on Customer Generation Departing Load even where the 3000 MW exclusion for the DWR Power Charge applied."

c. Reference to "150 MW" in the first full paragraph on page 5, in Conclusion of Law No. 4 on page 56 and in Ordering Paragraph No. 2 on page 58, is replaced with "80 MW".

d. The following is added on page 56 as Finding of Fact No. 23

"The pre-2001 portion of the transferred load in the Bypass Report was automatically excluded from the DWR forecast since its starting point was 2001."

e. The following language is added on page 57 as Conclusion of Law No. 10:

> "For purposes of determining whether an exclusion from CRS elements applies to MDL, as addressed in this decision, any exclusions apply only to the DWR Power Charge, but do not apply to ongoing CTC or to the DWR Bond Charge that are otherwise applicable. MDL that is excluded from DWR Power Charge remains liable for ongoing CTC and the DWR Bond Charge to the extent these charges are otherwise applicable."

f. The following language is added on page 60, as Ordering Paragraph No. 16:

> "D.03-07-028 is hereby modified to create a DWR Power Charge exception applicable to transferred load within the PG&E service territory corresponding to the estimates set forth in PG&E's August 2000 Bypass Report that were relied upon by Department of Water Resources in its power procurement process. Any CRS exception applicable to transferred load and new load shall be limited to the DWR Power Charge. Transferred load and new load still remain responsible for ongoing CTC and the DWR Bond Charge to the extent these charges are otherwise applicable."

g. The following language is added on page 60 as Ordering Paragraph No. 17:

> "New MDL within those geographic areas covered by the transferred load identified in PG&E's August 2000 Bypass Report, including geographic areas served by all publicly owned utilities identified in the Bypass Report as those areas existed as of February 1, 2001, is excepted from any obligation to pay CRS."

h. The following language is added to page 56 as Conclusion of Law No. 24:

> "The record developed in this proceeding provides a reasonable basis for a CRS exception for new MDL associated with the transferred load.".

i. Ordering Paragraph No. 4 on page 58 is changed to read as follows:

> "D.03-07-028 is hereby modified to create a CRS exception applicable to transferred load and new MDL associated with this transferred load within the PG&E service territory corresponding to the estimates set forth in PG&E's August 2000 Bypass Report that were relied upon by Department of Water Resources in its power procurement process."

2. Rehearing of D.04-11-014, as modified, is hereby denied.

This order is effective today.

Dated December 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent.

/s/ LORETTA M. LYNCH
Commissioner